Supreme Court, U.S.
FILED
10-994 JAN 4 - 2011
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

DON BAILEY
Petitioner

JESSE SMITH; MARY BENDER; RICK BURD; JOHN BREINER; DAN FLAHERTY; FRANK STERNER; DEB SMITH; JOHN DOE; RON HILL; MICHAEL FOERSTER; JOHN DOWLING; AND JOSEPH CURCILLO
Respondents

ON PEITITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Don Bailey, Esquire
PAID# 23786
4311 N. 6th Street
Harrisburg, Pa 17110

QUESTIONS PRESENTED

1. Whether the federal Court System is capable of Self Discipline?

Suggested Answer No!

2. Whether the Supreme Court of the Unites States has a duty to create an institutional mechanism for the review of attorney discipline where serious questions of judicial abuse arise below.

Suggested Answer Yes!

3. Whether an attorney and his client have the same rights to due process in disciplinary issues that other citizens have particularly as they affect property rights?

Suggested Answer Yes!

4. Whether Rule 8 of the U.S. Supreme Court is implicated in the underlying case?

Suggested Answer Yes!

LISTS OF PARTIES

All parties have been listed in the caption hereto.

CORPORATE DISCLOSURE STATEMENT

This document is not subject to any provisions of Supreme Court Rule 29.6.

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CITATIONS OF REPORTS BELOW

The Opinion of the Third Circuit Court of Appeals was filed on October 6, 2010 (*App A, A1).* Opinion of the Third Circuit Court of Appeals dated October 6, 2010 (*App B, 2A-3A).* Memorandum and Opinion of the Honorable Magistrate Rice dated August 5, 2010 (*App C, 4A-28A*).

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit, for which review is sought, was filed on October 6, 2010 (*App A).*

CONSITTUITIONAL PROVISION INVOLVED

The 1st Amendment to the U.S. Constitution is implicated in this case. The Amendment states in pertinent part as follows:

"Congress shall make no law...abridging the freedom of speech...or...to petition the Government for a redress of grievances."

The 5th Amendment to the U.S. Constitution is implicated in this case. The Amendment states in pertinent part as follows:

"No person...shall be deprived of life, liberty, or property, without due process of law".

The 14th Amendment to the U.S. Constitution is implicated in this case. The Amendment states in pertinent part as follows... nor deny to any person within its jurisdiction the equal protection of the laws".

STATEMENT OF THE CASE

Collie Rescue of Central Pennsylvania Inc. (CRCP) was a non-profit charity incorporated and licensed in Pennsylvania beginning in 1997. The appellant, Thom Lewis was the President and CEO of CRCP. On or about June 2000 the petitioner, Lewis filed a complaint with the "Department of State Bureau of Charities" regarding misconduct by Susan Ferree. The initial investigator assigned was Doreen Haar. The complaint was eventually referred to the Department of State and the Department of Agriculture. Because of the roles of these respondents in the transport of dogs along with the other public employee respondents the complaints of Thom Lewis went nowhere and instead he was subjected to extreme retaliatory misconduct at the hands of these respondents over a period of years. On or about early 2001 Hill targeted Lewis in a partnership with Ferree. He totally failed in efforts to encourage other law enforcement agencies to take action against Lewis. Lewis received information from a number of sources that Ron Hill was involved in pursuing a personal vendetta against him. Hill lied to representatives of the Auditor General's Office. He later used his official position in the Attorney General's office to assist Ferree in setting up a nonprofit organization similar to CRCP. On or about May 2001, having learned that Ferree was illegally using CRCP's license to sell dogs, CRCP filed a writ of summons against her and four others. On or about 2002 the petitioner complained

personally to the respondents Rick Burd that dogs were being illegally transported and sold by state employees using nonprofit entities.

Consequently the petitioner was increasingly made the target of unlawful and retaliatory investigations and retaliatory acts by former respondents in previous actions namely investigator Hill, attorney Downing, attorney Forester and others from the Pennsylvania Attorney General's Office, including, he believes others and the Charitable Trusts Division of the Pennsylvania Attorney General's Office. In January 2003 Lewis hired attorney Joseph Curcillo to represent CRCP. Later, by action of the CRCP board Curcillo was directed to also represent Thom Lewis in his personal capacity. Somewhat later Curcillo informed petitioner that he was contacting an attorney friend at the Pennsylvania Disciplinary Board supposedly to see if something could be done about Mr. Hill, Mr. Downing, and Mr. Pacella of the AG's office.

This "friend" according to Curcillo, had received complaints about Downing and Pacella before. Additionally Janice Anderson Esq., another attorney Curcillo claimed to know, was supposedly knowledgeable, as a former director of the "Division of Charitable Trusts" about "Pacella personally" and "how they operated". Petitioner later spoke personally with Anderson who definitively indicated to him that what Pacella and some of the conspirators were doing was clearly illegal. Petitioner was present when Curcillo called his friend and discussed these matters in a context of complaining about how Hill, Downing and Pacella

among others were trying to "get" Thom Lewis, his client. According to Curcillo, Disciplinary Counsel mentioned something about "trial support" and getting "support from other attorneys". At some later date the petitioner learned that this attorney appeared to be involved in the same dog trafficking he had complained about over the years and for which he was suffering retaliation. Petitioner later learned also that the attorney was involved in the transport of dogs, which, upon information and belief, petitioner alleges were being transported unlawfully into the state of Pennsylvania where they were illegally marketed and sold.

To the best of petitioner's knowledge this is still going on is It was around this period of time that the petitioner first began to realize how extensively a group of state employees were running charitable organizations out of state offices, with protection from state officials, which centered upon the unlawful acquisition of puppies and dogs from inside and outside of Pennsylvania. These puppies and dogs were then unlawfully transported and marketed within the state of Pennsylvania in blatant violation of state law to citizens who were unaware that they had not received proper veterinary attention in many cases and might even be diseased. Petitioner alleges that after he engaged Mr. Bailey that the retaliation against him significantly intensified, particularly at the hands of respondents Mary Bender, Rick Burd, and John Breiner. Breiner personally admitted this to petitioner. Petitioner alleges that within the last two years he was unlawfully treated differently than

other persons similarly situated in both the acquisition and retention of his state licenses by the respondents Bender, Breiner and Jesse Smith. Petitioner alleges that he was harassed and maliciously prosecuted at the express direction of the respondents Bender because of his choice of attorneys, and because he was opposed to the misconduct of Deb Smith, Mr. Flaherty, Mr. Sterner, and others unlawfully transporting and selling dogs in Pennsylvania.

The actions below were then appealed to the Third Circuit. In an opinion which Mr. Lewis appealed pro-se to this Court, the actions of Judge Muir and Jones was upheld. Later it had been learned that Flaherty had served under Jones at the Pennsylvania Liquor Control Board. After Lewis had appealed the "res judicata" decision to the Third Circuit (No. *08-3800)* in the succinct opinion by the Honorable Anthony J. Scirica, the actions of the Middle District Trial Judges were upheld.

Prior to Judge Scirica upholding the actions of Judge Muir and Jones in the underlying civil case, the defendants below filed (107 days later) a motion for attorneys fees that was placed before Judge Jones. Flaherty and Sterner's motions were approved immediately and neither Mr. Bailey nor Mr. Lewis were given a chance to respond. The attorney fees actions were appealed to the Third Circuit where they were assigned to Judge Scirica. It is worthy to note that Judge Scirica assigned the panel in *Venesevich v. Leonard et al.* (presently before this Court, repetitiously placing the same group of Judges (typically Judge Ambro on a

consistent basis among a small group and for himself) on panels hearing Mr. Bailey's cases. In *Roberts vs. Mentzer*, (*No. 10-306*), Judge Scirica personally appointed Judge Jones to sit by designation on a case which had been assigned to the Honorable Juan Sanchez of the Eastern District of Pennsylvania clerk (7 cases in a row assigned to one judge who methodically dismisses each case. Mr. Bailey's assigned to him just as Judge Jones did in two dozen other cases.

In the matter appealed here the hearing on counsels fees (assigned by Judge Scirica) to his former law clerk M.J. Rice resulted in a hearing where Mr. Lewis was even denied the right to subpoena the attorney, question the appellants, who supposedly billed the work, where Bailey was criticized for actions of the attorney who represented Lewis and was accused of composing his Writ to this Court which he did not write, or even advise Lewis on.

It is common knowledge that Don Bailey and his clients are victimized by a small group of Middle District Judges who are protected by a small group of Third Circuit Judges who have regularly abused the rights of Mr. Bailey and his clients. Mr. Bailey has competent evidence to prove every accusation that he makes in here and any other matters that he has discussed openly and repeatedly over the years. Mr. Bailey invites the opportunity to call witnesses to testify to support all these accusations. Without an opportunity to visit there matters in a detailed brief or address them in detail in anyway or in any forum,

the infirmities of the judicial systems inherently flawed self disciplinary practice has flagrantly violated the due process rights of innocent Americans to access their Court system.

REASONS FOR GRANTING THE WRIT

1. Is the federal court system capable of disciplining itself?

It is quite clear that the treatment afforded attorney Don Bailey, a highly successful civil rights lawyer, and in this particular case his client Thom Lewis, demonstrates that the federal court system is replete with political and personal friendships and is so inter-politically incestuous that it cannot adequately police itself without either the intervention of this court or some sort of mechanism set up by this court or the Congress which will protect lawyers and citizens from personal vindictiveness and ad hominum attacks by federal judges.

The case sub judice is quite simple. Any thorough and objective analysis of what occurred in the background of this case would reveal that the assault on Mr. Bailey and his client Thom Lewis was intentional and pretextual. Belatedly discovered interpersonal relationships between attorneys, law firms and the original District Court judges in this matter would raise a red flag for any reasonable and objective jurist. The blatant disregard of due process rights or just reasonable opportunities and or guarantees to either Mr. Bailey and most important to Mr. Lewis are prima facie inescapably plain.

Judge Jones had a duty to disassociate himself from judgment in these matters. The very nature with which Judge Muir and Jones treated the issues before them would make any objective judge sit back and be concerned. So widespread have these problems become in the federal judiciary that the Hon. Chief Justice Rehnquist (now deceased) before who, along with the rest of this honorable court, attorney Bailey personally appeared (with success) in a prior case that in response to congressional inquiries he commissioned a study into the matter. The issue plainly and simply was can the federal court system discipline itself? Without additional safeguards it cannot. The litany of mis-treatments including rampant and excessive dismissal of deserving cases, unfair and lack of thoroughness in the review process before repetitive panels of Third Circuit judges all aimed and focused upon Don Bailey and his clients because of his highly successful civil rights practice which has exposed persistent corruption in the Pennsylvania State Police and other state and local agencies (Mr. Bailey represents dozens of Pennsylvania State police officers) is a stark and unavoidable example. Implicit in these practices are clerks who work with these judges who see that certain cases for certain lawyers and or cases of certain types are assigned to the same judges over and over and in the Third Circuit to the same panels over and over. In one case, presently before this Court, namely *Venesevich, Petitioner v. Leonard et al.*

Respondents an example of a vindictive attack by a federal judge could not be more clearly defined and plain. If an attorney or citizen dares to speak up they suffer retribution. There is no institution, or at least any meaningful institution, where a complaint can be taken again without fear of retaliation.

For example the Clerk of the Eastern District of Pennsylvania, assigned case after case of Mr. Bailey and his clients to one Eastern District Judge, the Hon. Juan Sanchez (seven cases in a row), in a system that is supposed to assign cases by chance. Naturally these cases are, or certainly will be, systematically dismissed. In the case of the Hon. John E Jones III of the Middle District of Pennsylvania roughly 2 dozen cases to date, without interruption, where Mr. Bailey was the attorney were dismissed some on patently frivolous and indefensible grounds. This is a buddy system composed of friends supporting friends and it is not difficult to discern what is going on. This court will undoubtedly never read the transcript of the proceedings before Magistrate Judge Rice nor will it, undoubtedly, read in any detail, what occurred in the cases in pleadings before Judges Jones and Muir. Furthermore it should not have to, any more than it should have to hunt for universal or general principles worthy of this Court's consideration. The failure comes in the inherent structure where judges have an inherent (as with Jones) or predilection for any improper or non-judicial reason, to use their courtroom and access to it as a way to punish, obstruct, delay, and intimidate. The normal human

weakness to view any error or shortcoming, where excessive power resides in the adjudicator coincidental to a personal or political interest, as a personal affront or criticism of an exceptionally deferential public position, as a personal assault to be rationalized into an attack on the critic makes the reliability of the current bootstrapping posture of our federal courts unacceptable and institutionally dangerous. Resort to any sort of administrative officer judicial misconduct board is simply not viable and doesn't work as any person in the position of your petitioner's can tell this court.

The sample, or report to the Chief Justice undertaken by Associate Justice Steven Breyer is helpful and may be the starting point but it does not begin to address the real underlying problem and that is abusive misconduct based upon political and or personal affiliations among judges, as in this case, and a reluctance to address the misconduct. At the very least a thorough investigative process should be available to come plaintiffs with some standard governor any relevant factual findings. Sadly this matter may be one necessitating continuing legislative oversight as a result of public upset (admitting that the U.S. Supreme Court having original constitutional jurisdiction is not in a class with our appellate and district courts where Congress exercises significant statutory control).

Currently the federal court system which lies beneath the Supreme Court of the United States is not capable of disciplining itself in the incidence of abuse will continue to grow and augment if action is

not taken by this court in its responsibility to discipline and police this system.

2. The Supreme Court or United States has a duty to create an institutional mechanism for the review of attorney discipline where serious questions of judicial abuse arise below.

There is only one court of original constitutional jurisdiction in our nation. That court is the Supreme Court of the United States. The duty and responsibility of this Court to administer and set standards for self restraint, self-discipline, and adjudicatory responsibility in matters pertaining to federal court business are manifest. Instead of circling the wagons when concerns are raised (as in *Venesevich v. Leonard* et al.) this Court has a duty to erect institutions that will protect the ultimate matter at issue in these cases and that is the access of American citizens by and through their lawyers to their courts. It is an ultimate mockery of official responsibility to have the United States Congress establish federal district courts with the primary responsibility to safeguard the rights of American citizens while, as in this case, it is plain that something wrong is going on in denying access to the court system itself and attempting to intimidate or deter American citizens in the exercise of that right. There is not even a mechanism present in our court system, nor in the offices of the Atty. Gen. of the United States, to adequately look into these matters. Lawyers in the United States are an intimidated and deprived class of citizens who seek to represent and defend American citizens, among the most important of things, and that is defense against the abusive

powers of government, but yet find that if they do so, if they complain of court access, or even if they seek to have a court vacate and reconsider what on its face might be a plain error, they will suffer recrimination.

The core issue which began the pattern of retaliation suffered by Don Bailey and his clients was the aggressive organization by the Hon. Christopher C. Conner to retaliate against Don Bailey because he asked the court to vacate and reconsider a plain error by Judge Conner which had racial implications. This matter became transformed into a vendetta joined by two other Middle District Judges and a couple of willingly compliant magistrate judges. (See *Venesevich*) The tragedy is that there are innumerable other bright and objective federal district judges, within Pennsylvania's Middle District and at the Third Circuit who do not receive recognition for their doing what a judge should do and that is to be a "neutral and detached magistrate".

3. An attorney and or his client should have the same rights to due process in disciplinary issues and procedures enjoyed by other citizens including those that affect property rights.

An examination of the procedures and practices which occurred below this court at No. 08-3800 in the Third Circuit Court of appeals demonstrates a total lack of due process guarantees available to lawyers and their clients in cases where they are involved in matters which incur judicial displeasure. The hearing held before Magistrate Judge Timothy R. Rice resulted in a hearing where Mr. Lewis (and

ostensibly Mr. Bailey is supposed) were denied the opportunity to subpoena witnesses, incredibly, including the witnesses who allegedly did the actual work (which was grossly embellished) for the fees being claimed. See Matthew Lockary, et al. vs. Paul Kayfetz et al. 974 F.2d 1166 (1992), *MacDraw, Inc. v. CIT Group Equip. Fin. Inc.* 73 F.3d 1253, 1257 (2nd Cir 1996); Schoenberg, 971 F.2d at 934; Jurinko v. Medical Protective Co., 03-CV-4053, (E.D. Pa. July 30, 2009); Introcase v. Cunningham, 857 F.2d 965, 970 (4th Cir 1988); Unanue Casual v. Unanue Casual, 132 F.R.D. 146, 151-52 (D.N.J. 1989) (declining to award attorneys fees fro brining sanctions motion), aff'd 898 F. 2d 839 (1st Cir 1990); Cooter & Gell v. Hartmarx Corp, 496 U.S. at 406, 110 S.Ct. at 2461; Geller v. Randi, 40 F.3d 1300, 1304 (D.C. Cir 1995); Aziz v. Pa State University, 1998 WL 964483, at 3 (E.D. Pa. Nov 17, 1998); Carbone v. Gen. Accident Ins. Co., 1996 WL 420427, at 2 (E.D. Pa. July 25, 1996) and Puricelli vs. Morris et al., (D.C. Civil Action No. 99-CV-05974 Submitted Under Third Circuit LAR 34.1(a) February 15, 2005 decision filed May 10, 2005.

It is impossible to believe that any other proceeding in the United States of America, under any other circumstances, would result in the denial of an opportunity to either do discovery or bring an opposing claimant in the court and question them. In the case below the Hon. Judge Rice commented in dismissive fashion that the attorney who represented Sterner and Flaherty "supervised" him. Why does this justify a deny all of the right to depose

or question the attorney who purportedly did the work on these issues?

Further, it should also be noted in the companion case Judge Jones permitted attorney Montgomery and Schertz to file their motions for attorney's fees months late that he also dismissed plaintiff's objections to missing briefing responsibilities because he claimed his law firm did not receive their West-Law Rulebooks on time. Your petitioners were denied the right to question opposition attorneys and or complainants even though Montgomery is extremely active with the Middle District courts heading up their rules modification committee i.e. she helped write the applicable changes in the rules but did not complete her work on time. Had attorney Don Bailey, or Mr. Lewis pro se committed such an infraction they would not only have had their submissions dismissed they would've been sanctioned on top of it. During the hearing when Mr. Bailey tried to explain the abuse he had been subjected to in the Middle District as a root cause of why he was being pulled in before the "Master" Judge Rice, he was dismissed out of hand and told not to proceed yet this issue was used as a point of criticism in Judge Rice's opinion, if memory serves. If a court wishes to take the property of the citizen including a plaintiff before our courts, or an attorney they should at least be entitled to rudimentary due process opportunities.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully Submitted

Don Bailey Esquire
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717 221-9500

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

August 24, 2010

No. 08-3800
Thorn Lewis
v.
Jesse Smith , et al
(M.D. Pa. No. 07-CV-02011)

Present: SCIRICA, BARRY and SMITH, Circuit Judges

Motion by Appellees' Dan Flaherty and Frank Sterner for Entry of Judgment and/or Amendment of Order dated August 5, 2010.

/s/ Phyllis Ruffin
Case Manager 267-299-491

See Order dated August 5, 2010

ORDER

The foregoing motion for entry of judgment is granted. The Clerk is directed to transmit a certified copy of the order filed August 5, 2010 to the District Court for entry as a judgment on the District Court docket.

By the Court,
/s/Anthony J. Scirica
Circuit Judge

Dated: October 6, 2010

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-3800

Lewis v. Smith
(M.D. PA. No. 4-07-CV-02011)
Present: SCIRICA, BARRY and SMITH,
Circuit Judges

1. Motion by Don Bailey, Counsel for Appellant, for Rehearing of Court's Order filed August 5, 2010, which the Court may wish to Construe as a Motion to Submit the Order filed August 5, 2010 for En Banc Review Pursuant to 3d Cir. I.O.P. 10.3.3.
2. Motion by Don Bailey, Counsel for Appellant, to Exceed Page Limitation For Motion for Rehearing.
3 Motion by Don Bailey, Counsel for Appellant, to Attach Exhibits to Motion for Rehearing.
4 Amended Motion with Exhibits by Don Bailey, Counsel for Appellant, for Rehearing of Court's Order filed August 5, 2010.
/s/ Phyllis Ruffin Case Manager 267-299-4918
See attached Court's August 5, 2010 Order.

ORDER

The foregoing motion to exceed the page limitation is hereby granted. The motion to attach exhibits to the motion for rehearing is denied. Both the Court's August 5, 2010 order and the Report and Recommendation of the Magistrate Judge are

docketed in this appeal. The remaining proposed exhibits are not part of the record on appeal. The request to submit the order filed August 5, 2010 for en banc review is denied. The motion for rehearing or reconsideration of the Court's August 5, 2010 order is denied.

By the Court,
/s/ Anthony J. Scirica
Circuit Judge

Dated: October 6, 2010
par/cc: All Counsel

Date Filed: 07/28/2010

UNITED STATES COURT OF APPEAL FOR THE THIRD CIRCUIT

NO. 08-3800

THOM LEWIS

Appellant

v.

JESSIE SMITH;
MARY BENDER; RICK BURD; BREINER;
DAN FLAHERTY; FRANK STERNER; JOHN DOE

Appellees

(W D Pa Civil Action No. 06-CV-0393)

REPORT AND RECOMMENDATION

TIMOTHY R. RICE July 28, 2010
U.S. MAGISTRATE JUDGE

Appellees Dan Flaherty and Frank Sterner ("Appellees") seek an award of $39,565.84 in attorneys' fees and costs, pursuant to Fed. R. App. P. 38, 42 U.S.C. § 1988, and 28 U.S.C. § 1927, from Appellant Thorn Lewis and his counsel, Don Bailey ("Appellant"). Pursuant to Rule 48 of the Federal Rules of Appellate Procedure, I was appointed Special Master to recommend resolution of this matter. See Order, Lewis v. Smith, No. 08-3800 (3d Cir. Mar. 30, 2010); see also Fed. R. App. P. 72(b); Fed. R. Civ. P. 54(d)(2)(D).

After reviewing the record, Appellees' Motion for

Attorneys' Fees, Appellant's Motion to Dismiss, all responses, and the evidence and arguments presented during the evidentiary hearing, I recommend Appellant's Motion to Dismiss be DENIED, and Appellees' Motion for Attorneys' Fees be GRANTED in part, and DENIED in part. Appellees should be awarded $28,041.71, pursuant to Rule 38, and in the alternative under 28 U.S.C. § 1988 and 42 U.S.C. § 1927.

I. Factual and Procedural History

The facts of the underlying dispute are summarized in the opinions of this Court and the District Court. See Lewis v. Smith, 361 Fed. Appx. 421 (3d Cir. 2010); Memorandum, Lewis v. Smith, No. 07-2011,2008 WL 3200836, at *1-2 (M.D. Pa. Aug. 7,2008). I will briefly summarize the facts relevant to the fee petition.

Attorney Bailey, on behalf of his client, filed a complaint in the United States District Court of the Middle District of Pennsylvania against several employees and private citizens of the Commonwealth of Pennsylvania, alleging they had used Appellant's kenneling license for an illegal purpose ("Lewis I"). See Appellant's Appendix Volume II at 77-100, Lewis v. Smith, No. 08-3800 (3d Cir. Feb. 17, 2009) [hereinafter Appellant's Exh.]; see also 361 Fed. Appx. at 422. Appellant claimed appellees were involved in the illegal transportation and sale of dogs in Pennsylvania and had harassed and retaliated against him. See 361 Fed. Appx. at 422.

On August 13, 2007, Appellees moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6).

Id at 423. Instead of filing a brief in opposition, Appellant filed an amended complaint. Id On September 5, 2007, the Honorable Malcolm Muir dismissed Appellant's amended complaint under Rule 15(a) because Appellant had not obtained prior authorization from the Court or written consent from the Appellees. See 361 Fed. Appx. at 423 (citing Fed R. Civ. P. 15(a)); see also Order, Lewis v. Smith, No. 07-512 (M.D. Pa. Sept. 5,2007). Judge Muir granted Appellant an additional twenty days to file a brief in opposition to the motion to dismiss. Id. Appellant filed a brief, and on October 18, 2007 Judge Muir granted Appellees' motion to dismiss. Id Appellant did not appeal.

Instead, Appellant filed a new § 1983 civil rights complaint two weeks later against Appellees in the Middle District of Pennsylvania ("Lewis II"). See id. at 423; Lewis, 2008 WL 3200836, at *1-2. Lewis II listed the same defendants and made the same general allegations regarding Appellees' involvement in the illegal transportation and sale of dogs in Pennsylvania and their retaliation against Appellant. See id On August 7, 2008, the Honorable John E. Jones, III granted Appellees' motion to dismiss based on res judicata. Lewis, 2008 WL 3200386, at *1-2. Appellant appealed. See Brief of Appellant, Lewis v. Smith, No. 08-3800 (3d Cir. Feb. 17, 2009) [hereinafter Appellant Brief]. This Court affirmed, holding Lewis II was barred by res judicata. See 361 Fed. Appx. at 423.

Appellant contended there were factual differences between the complaints in Lewis I and Lewis II. See 261 Fed. Appx. at 424 n.5. This Court, however, found Appellant's additional facts were used only to support legal theories, and did not preclude a res judicata dismissal. Id In evaluating the "essential similarity of the underlining events giving rise to the various legal claims," id (citing Davis v. U.S. Steel Supply, 688 F.2d 166, 171 (3d Cir. 1982)), this Court considered the following factors: (1) whether the acts complained of and the demand for relief were the same; (2) whether the theory of recovery was the same; (3) whether the witnesses and documents necessary at trial were the same (that is, whether the same evidence necessary to maintain the second action would have been sufficient to support the first); and (4) whether the material facts alleged are the same. See id. (citing United States v. Athlone Indus., Inc., 746 F.2d 977, 984 (3d Cir. 1984)). This Court concluded there was an essential similarity in the underlining events giving rise to Lewis I and Lewis II, which precluded Appellant's second suit. Id. If Appellant disagreed with Judge Muir's ruling in the first suit, this Court stated, Appellant should have filed a motion for reconsideration or an appeal, not a second action. Id at 424.

On February 22, 2010, Appellees sought fees and costs. See Motion for Attorneys' Fees and Non-Taxable Costs, Lewis v. Smith, No. 08-3800 (3d Cir. Feb. 22, 2010) [hereinafter Motion for Attorneys' Fees]. An evidentiary hearing and oral argument was

scheduled for June 7, 2010. See Order, Lewis v. Smith, No. 08-3800 (3d Cir. Mar. 30, 2010). On June 3, 2010, Appellant moved to dismiss Appellees' fee petition, arguing Appellees' claims for fees under 28 U.S.C. § 1927 and 42 U.S.C. § 1988 were abandoned because Appellees did not list Appellant or his attorney as witnesses for the evidentiary hearing, and intended only to present evidence on the reasonableness of their bills. See Appellant's Motion to Dismiss at 3, Lewis v. Smith, No. 08-3800 (3d Cir. June 3, 2010) [hereinafter Appellant's Motion to Dismiss]. Appellant further argued I had "implicitly ratified" the abandonment of the claims by allocating ninety minutes to each party for the hearing, denying Appellant's requests for subpoenas, and granting Appellees' request to submit affidavits for a witness who was unable to attend the hearing. See id. at 3-4; see also Order, Lewis v. Smith, No. 08-3800 (3d Cir. May 6, 2010); Order, Lewis v. Smith, No. 08-3800 (3d Cir. May 25, 2010). Appellant also claimed Appellees' Rule 38 claim should be dismissed because Rule 38 required this Court's merits panel to deem the appeal frivolous in its February 17, 2009 opinion. Appellant maintains I have no authority to find the appeal frivolous. See Appellant's Motion to Dismiss at 4.

I held an evidentiary hearing and oral argument on June 7, 2010. I heard testimony from Attorney Bailey, Lewis, Appellees' counsel, Bridget Montgomery, and Andrew Ostrowski, Appellant's counsel for the fee petition proceeding.[1] See Transcript of Evidentiary Hearing Regarding Fee Petition Before the Honorable

Timothy R. Rice, United States Magistrate Judge, Lewis v. Smith, 08-3800 (3d Cir. June 7, 2010) [hereinafter Transcript]. On June 23, 2010, Appellees submitted a revised statement of fees, see Revised Statement of Fees Sought, Lewis v. Smith, No. 08-3800 (3d Cir. June 23, 2010) [hereinafter Revised Statement].

II. Grounds for Attorneys' Fees and Sanctions

A. Rule 38

Rule 38 allows this court to award damages, and single or double costs to appellees if it determines an appeal is frivolous. In determining whether an appeal is frivolous, I must focus on the merits of the appeal, regardless of good faith or bad faith. Sun Ship, Inc. v. Matson, 785 F.2d 59, 64 (3d Cir. 1986). An appeal is frivolous if it is wholly without merit. See Fishkin v. Susquehanna Partners G.P., 340 Fed. Appx. 110, 120 (3d Cir. Jul. 27, 2009) (citing Quiroga v. Hasbro, Inc., 943 F.2d 346, 347 (3d Cir. 1991)); Dasilva v. Esmor Correctional Servs., 167 Fed. Appx. 303, 309 (3d Cir. 2006). Claims that ignore contrary case law, offer no colorable argument or support, present incomprehensible arguments, or contain nothing of substance or merit, are frivolous. See Dasilva, 167 Fed. Appx. at 309; see also Beam v. Bauer, 383 F.3d 106, 108 (3d Cir. 2004); Hilmon Co. v. Hyatt Int'l, 899 F.2d 250, 253 (3d Cir. 1990).

This Court has been reluctant to classify appeals as frivolous, fearing novel theories would be chilled and litigants deterred from advancing claims or defenses that have colorable support under existing

law or reasonable extension thereof. See Hilmon Co., 899 F.2d at 254.

[1] Attorney Robert Hoffman represented Appellees and their counsel in the fee petition proceeding.

Nevertheless, where appeals are devoid of merit, and lack colorable argument or support, damages and costs are justified under Rule 38. See Dasilva, 167 Fed. Appx. at 309 (citing Hilmon Co., 899 F.2d at 253) (appeal was frivolous when it ignored contrary case law, "offered no colorable argument," and constituted a "nearly incomprehensible argument"); Beam, 383 F.3d at 108 (appeal was frivolous when it "contained nothing of substance or merit")).

L Appellees' Motion for Attorneys' Fee

The District Court's opinion explicitly and thoroughly discussed the established law on res judicata. See Lewis, 2008 WL 3200836, at *1-2. Its opinion cited both Third Circuit and Supreme Court precedent on res judicata. See id at 2-3 (citing Federated Dep't Stores v. Moitie, 452 U.S. 394, 399 n.3 (1981); Post v. Hartford Ins. Co., 501 F.3d 154, 169 (3d Cir. 2007); Alston v. Parker, 363 F.3d 229, 235 (3d Cir. 2004); Shane v. Fauver, 213 F.3d 113, 115 (3d Cir. 2000); Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 963 (3d Cir. 1991)). The District Court found the elements required for res judicata were met because: (1) the dismissal of Lewis I for failure to state a claim under Rule 12(b)(6) was a final judgment on the merits for res judicata purposes; (2) the plaintiff and the defendants were the same in both Lewis I and II; and (3) Lewis I and Lewis II both alleged the same civil

rights causes of action arising out of Lewis' allegations of the illegal sale and transportation of dogs. See Lewis, 2008 WL 3200836, at *2-3. This ruling gave Appellant and Appellant's counsel notice of the legal standard and controlling law for res judicata. See Lewis, 2008 WL 3200836, at *2-3. Nevertheless, Appellant failed to discuss the legal standard or cite controlling law for res judicata in his appellate brief. See Brief of Appellant at 23-28, Lewis v. Smith, No. 08-3800 (3d Cir. Feb. 17, 2009) [hereinafter Appellant Brief]. Lewis ignored contrary case law and did not mention a single case referenced in the Lewis II opinion. Compare id. with Lewis, 2008 WL 3200836, at *2-3. Nor did Appellant argue for a new interpretation of established law or that the District Court's application of the res judicata legal standard was erroneous. See Appellant Brief at 22-29. Appellant's brief did not argue the Lewis I decision was not a final decision on the merits, or that the cause of action and the parties were different. See id Appellant did not argue an extension of the law. Id He did not cite any cases for the proposition that the Lewis II court's error provided an exception to clearly established rules of res judicata. See id Instead, Appellant argued the Lewis I court should have permitted his second amended complaint and that the Lewis II court should have corrected this error by not dismissing the case. See id. As this Court held, the proper avenue for Appellant's argument that the Lewis I court erred was a timely appeal of Judge Muir's order. See 361 Fed. Appx. at 424. Error does not

render Lewis I's Rule 12(b)(6) judgment "'anything other than a final judgment on the merits.'" Id (quoting Selkridge v. United of Omaha Life Ins. Co., 360 F.3d 155, 172 (3d Cir. 2004)). Appellant failed to distinguish his case from Supreme Court precedent, which rejected the argument that res judicata does not apply when there has been error by the court in the previous action. See id; see also Appellant Brief at 23-28. During oral argument on the fee petition, Appellant claimed Semteck Intern, Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001), supported his position that Lewis II was not precluded by res judicata. See Transcript at 64. Appellant did not, however, reference or cite Semteck in his appellate briefs. See Appellant Brief at 1-29; see also Reply Brief of Appellant at 7 1-8, Lewis v. Smith, No. 08-3800 (Mar. 31, 2009) [hereinafter Reply Brief].[2] To the extent he now rests on Semteck, I find his claim "nearly incomprehensible." See Dasilya, 167 Fed. Appx. at 309; see also Hilmon Co., 899 F.2d at 253. Semteck concerns different legal issues, i.e., whether the dismissal of a claim under federal rules also precludes the assertion of the claim under state law. See Semteck, 531 U.S. at 499-508. These issues are unrelated to the straightforward res judicata question here.

Appellant's appeal was frivolous because it was devoid of merit and failed to assert any colorable argument or support under existing law. I recommend Appellees be awarded attorneys' fees under Rule 38.[3]

2. Appellant's Motion to Dismiss

Appellant nevertheless claims I have no authority to

make this finding because Rule 38 requires a court of appeals merits panel to determine the frivilousness of a claim. See Appellant's Motion to Dismiss at 4; see also Transcript at 190-91. Appellant's argument fails for three reasons. First, the plain language of Rule 38 does not state an appellate court's merits panel must assert in its opinion the claim was frivolous. Second, Appellant cites no case law to support his argument. Third, pursuant to Rule 48,1 was authorized by this Court to recommend resolution of the fee petition. Therefore, Appellant's motion to dismiss should be denied as frivolous.

[2] Further, Appellant's counsel testified he did not remember relying on Semteck. See Transcript at 153-54.

[3] Although double damages may be justified, Appellees have not requested them. See Transcript at 112. In any event, I recommend they not be imposed.

3. Payment of Fees

I must determine whether Appellant, his counsel, or both should pay the fee award. Attorneys have an affirmative obligation to research the law and determine if an appeal is utterly without merit and may be deemed frivolous. Quiroga, 943 F.2d at 347; Hilmon Co., 899 F.2d at 254. If counsel ignored or failed in this obligation to his client, he may become personally liable to satisfy a Rule 38 award. Quiroga, 943 F.2d at 347. The test is whether, after a thorough analysis of the record and careful research of the law, a reasonable attorney would conclude the appeal is

frivolous. Id. (citing Hilmon Co., 899 F.2d at 254). Appellant's counsel failed to satisfy this fundamental obligation to his client. Appellant's appellate brief ignored contrary case law and failed to present colorable arguments in a well-developed area of law. Such evidence demonstrates an egregious failure by counsel to thoroughly analyze the record and carefully research law. Counsel purposely ignored and disregarded law and procedure, an area of expertise customarily committed to counsel and not the parties. See id. have carefully considered the testimony of Attorneys Bailey and Ostrowski concerning Appellant's justification for filing the appeal. See Transcript at 113-56, 172-81. I find their explanations incredible. Both attorneys failed to explain a sound legal basis for their decision to appeal. See id Attorney Bailey was ambiguous and vague in his testimony, stating he did not remember if he consulted other attorneys about the decision to appeal, and that he "probably bounced it off of a few people. See id, at 119-20. Further, he could not clearly articulate which cases he read and researched for his brief. Id at 113-56. Attorney Ostrowski testified Attorney Bailey consulted him about whether Lewis II would be barred by res judicata. See id. at 173-74.

However, Attorney Ostrowski also did not discuss or reference any cases he had relied on when advising Attorney Bailey. See id. at 172-81.[4] Moreover, the demeanor and manner of Attorneys Bailey and Ostrowski evidenced personal hostility to

Appellees, their counsel, and the judiciary in the Middle District of Pennsylvania. For example, Attorney Bailey's testimony, and Attorney Ostrowski's questioning, focused on an alleged plot by Appellees, their counsel, and judges in the Middle District to harm Attorney Bailey. Attorney Bailey testified he was mistreated by the District Court because of who he is. See id. at 128 ("... I was being mistreated because I'm Don Bailey."). On cross-examination, Attorney Ostrowski asked Attorney Montgomery if she had conversations about Attorney Bailey with a judge she previously clerked for, and whether she was a member of a secret cult. See Transcript at 55, 57. Attorney Ostrowski asked the following:

Ostrowski: Are you a member of Mr. Flaherty's and Mr. Sterner's cult?

Hoffman: Objection.

The Court: Say it- hold on, hold on, hold on. I didn't hear the question.

Ostrowski: I said, are you a member of Mr. Sterner and Mr. Flaherty's cult or any of their cults?

The Court: What's a cult?

Ostrowski: A cult is, you know, whatever these guys run some kind of outfits up there in Central Pennsylvania where they bring people in and they look for spaceships and they do all kinds of wacky stuff and -

The Court: They do what?

Ostrowski: They get into swimming pools naked and wait for spaceships to
land, and they have all kinds of healing techniques

and all kinds of things, and I'm just asking[,]Ms. Montgomery about her connection with these guys. I think its reasonable.

Hoffman: Let's assume that all that's— do I need to say anything, You Honor?

The Court: Wow.

Hoffman: May I object, respectfully?

[4] Moreover, Attorney Ostrowski's role as counsel in this proceeding establishes bias, further discrediting his testimony.

The Court: Let me do this. I'm going to ask you a different question, ma'am. Are you a member of any clubs or groups, whether formal or informal, with either of these two gentlemen?

Witness: None whatsoever.

The Court: Okay. So the objection's sustained.

See Transcript at 55. Attorney Ostrowski stated Appellant's defense was that the fee petition proceeding was part of a conspiracy among judges in Harrisburg, Pennsylvania to harm Attorney Bailey and anyone associated with him. Id at 57-58. Throughout the hearing, Appellant's counsel implied Appellee, Appellee's counsel, and this Court were connected to this plot. See id. at 6, 70-71, 118, 132, 143, 187-88, 193. I find no such motives. To the contrary, I find Attorney Bailey has used this appeal and the related fee litigation to perpetuate unfounded litigation and publicly assert his conspiracy theories. Appellant had a right to rely on counsel for sound advice on law and procedure. See id. I see no reason to burden him with fees incurred because of counsel's erroneous pursuit of

a frivolous appeal. Consequently, I recommend the award of attorneys' fees be paid by Appellant's counsel, Attorney Bailey.

B. 42U.S.C. § 1988

42 U.S.C. § 1988 permits an award of reasonable attorneys' fees and costs to prevailing parties in specified civil rights litigation. City of Riverside v. Rivera, 477 U.S. 561, 567-68 (1986). Congress enacted § 1988 to encourage meritorious civil rights lawsuits that might otherwise be abandoned due to the financial constraints of hiring competent counsel. Id at 577-78. However, where an appeal is frivolous, unreasonable, or without foundation, fee shifting is permitted upon discretion of the court. See 42 U.S.C. § 1988; see also Pennsylvania v. Flaherty, 40 F.3d 57, 63 (3d Cir. 1994). Using an objective test, I must determine whether the plaintiff knew, or should have known, the legal or evidentiary deficiencies of his claim. Brown v. Chambersburg, 903 F.2d 274, 277 (3d Cir. 1990). As discussed above, Appellant's appeal was frivolous. See supra 5-11. Clearly established law on res judicata speaks to the issue of preclusion and whether an error in a previous ruling renders that judgment "anything other than a final judgment on the merits." See 361 Fed. Appx. at 424. Appellant should have known his claim was frivolous, unreasonable, and without foundation because the law was presented and discussed in the District Court. Despite the legal standard and contrary case law, Appellant persisted with an appeal without distinguishing his case or arguing for a new interpretation or extension of the law.

Consequently, Appellees are also entitled to attorneys' fees under § 1988. No reasonable attorney would have filed such a frivolous appeal.

C. 28 U.S.C. § 1927

Under 28 U.S.C. § 1927, "any attorney or other person admitted to conduct cases in any court of the United States ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the Court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Section 1927 requires a finding that counsel's conduct is of "an egregious nature, stamped by bad faith that is violative of recognized standards in the conduct of litigation." Grider v. Keystone Health Plan Central, Inc., 580 F.3d 119, 142 (3d Cir. 2009) (quoting LaSalle Nat'l Bank v. First Connecticut Holding Group, L.C.C. XXII, 287 F.3d 279, 289 (3d Cir. 2002)). A finding of bad faith is required to avoid chilling an attorney's zealous representation of his client. Baker Indus. Inc. v. Cerberus Ltd., 764 F.2d 204, 208 (3d Cir. 1985). Absent bad faith, an attorney may be guilty of only a mistake in professional judgment in pursuing a client's goals. Baker Indus. Inc., 764 F.2d at 208-09.

Bad faith is a factual determination. Evidence of bad faith includes: (1) the claims advanced were meritless; (2) counsel knew or should have known the claims were meritless; and (3) the motive for filing the suit was for an improper purpose, such as harassment. See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 278 F.3d 175, 188 (3d Cir. 2002).

As previously discussed, Appellant's claims were

meritless and Appellant's counsel should have known the claims were meritless based on the abundance of case law on the issue. See supra 5-9. Appellant's bad faith is further demonstrated in the manner in which he has challenged the fee petition. Appellant counsel's conduct attests to his improper motives and purpose. Four days before the oral argument and evidentiary hearing, Appellant filed an unfounded motion to dismiss. See Appellant's Motion to Dismiss at 1-5; see supra 8. His motion to dismiss did not cite or reference any cases to support his proposition that both 28 U.S.C. § 1927 and 42 U.S.C. § 1988 have a "state of mind requirement" that can be waived by not presenting certain witnesses. Id. The motion to dismiss failed to even reference or cite the standard for a motion to dismiss. Id. Further, Appellees' decision not to call Appellant Lewis and his attorney to testify was not fatal to their claims, as Appellant contends, because other evidence, such as the appellate briefs and testimony from attorneys, supports their assertion Appellant's appellate action was filed in bad faith. Appellant's assertion that this Court's order regarding the logistical presentation of arguments and the submission of affidavits for unavailable witness, see Fed. R. Evid. 611,[5] somehow ratified the abandonment of these claims mischaracterizes and erroneously interprets the Court's order. Such improper legal tactics employed by the Appellant establishes the bad faith that has characterized this appellate litigation.

On behalf of Lewis and Attorney Bailey, Attorney Ostrowski's line of questioning at the hearing confirmed Appellant's motive to harass and embarrass. During the hearing, Appellant's counsel asked Attorney Montgomery if she was a member of a "cult" with the Appellees - a cult Appellant alleges wears special outfits, swims naked, waits for spaceships to land, and has different "healing techniques." See Transcript at 55. I did not permit this bizarre line of questioning. Id Further, Appellant counsel had to be continuously reminded, throughout the hearing, to be respectful and maintain decorum. Seee^g. id. at 55-57, 163. Nevertheless, counsel persisted in referring to witnesses and counsel by their first names and judges by only their last names, see id. at 57-58, 125, 150-52, and making sarcastic and inappropriate remarks, see e^g. id at 4,48, 52 (characterizing evidence as "worthless"), 55 (questioning witness about alleged "cult" involvement), 56-58 (alleging Court impropriety and naming judges allegedly plotting against Attorney Bailey), 66-71, 78, 86-87 (suggesting I was biased), 89 (inappropriate commentary after witness' answer), 126-27 (attempting to make fun of opposing counsel), 143, 163 (making gratuitous remarks), 187. Appellant's counsel even questioned the existence of David Schertz, Esq. an associate who worked on the case and whose name appeared multiple times on the submitted billing records. Id. at 36-38.

[5] "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence as to (1) make the interrogation and

presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." See Fed. R. Evid. 611(a). Appellant unreasonably and vexatiously multiplied the appellate litigation by presenting appellate claims which were not well grounded in existing law. See supra at 5-12. Appellant's appeal needlessly consumed the time of the parties in researching, strategizing and preparing for a frivolous appeal. Attorneys' fees are justified under 28 U.S.C. § 1927.

III. Award of Attorneys' Fees

A party seeking attorneys' fees and costs must submit evidence supporting the hours worked and rates claimed. Specificity is crucial in requesting, challenging, and granting attorneys' fees. United Auto. Workers Local 259 Soc. Sec. Dept., v. Metro Auto Ctr., 501 F.3d 283, 291 (3d Cir. 2007). A fee petition must be accompanied by "fairly definite information as to hours devoted to various general activities ... and the hours spent by various classes of attorneys." Id. (quoting Evans v. Port Auth., 273 F.3d 346, 361 (3d Cir. 2001)). In determining a reasonable fee, I begin by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Excessive, redundant, and unnecessary hours should be excluded. Id at 434 ("Hours that are not properly billed to one's client also are not properly billed to one's adversary."). The party opposing the fee petition may challenge, by affidavit or brief with sufficient specificity, the

reasonableness of the requested fee. Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990). A fee award, however, cannot be decreased based on factors not raised by the adverse party. Id.; see Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 426 F.3d 694, 711 (3d Cir. 2005) (court can reduce a fee award only in response to specific objections). Once objections are raised, the court has a great deal of discretion to adjust the fee award in light of the objections. Rode, 892 F.2d at 1183.

Generally, a reasonable hourly rate is calculated according to the prevailing market rates in the community. Washington v. Phila. Court of Common Pleas, 89 F.3d 1031, 1035 (3d Cir. 1996). The party seeking attorneys' fees has the burden of producing sufficient evidence of what constitutes a reasonable market rate for the character and complexity of the legal services rendered. Id. Once the lodestar, i.e., reasonable hours expended multiplied by reasonable hourly rate, is calculated, I must determine if the fee should be reduced based on the following factors: (1) time spent pursuing unsuccessful claims distinctly different and unrelated to the "ultimate result achieved;" (2) time and labor required; (3) novelty and difficulty of the questions; (4) the skill requisite to perform the legal service properly; (5) the preclusion of employment by the attorney due to acceptance of the case; (6) the customary fee; (7) whether the fee is fixed or contingent; (8) time limitations imposed by the client or the circumstances; (9) the amount involved and the results obtained; (10)

the experience, reputation, and ability of the attorneys; (11) undesirability of the case; (12) the nature and length of the professional relationship with the client; and (13) awards in similar cases. Rivera, 477 U.S. at 568 & n.3 (citing Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974)); Henslev, 461 U.S. at 429-30 & n.9.

A. Reasonableness of Hourly Rates

Counsels' hourly rates are reported as follows: Attorney Montgomery, $250.00 per hour; Attorney Schertz, $150.00 per hour; and Attorney Hoffman, $405.00 per hour. See Revised Statement at Exh. Ql-4. Appellees submitted the declaration of an attorney, Joseph U. Metz, who stated practitioners at regional or national law firms with Harrisburg offices currently have hourly rates in the mid-to-high $300s (and even higher for certain specialized work). See Motion for Attorneys' Fee at Exh. P. Appellant does not contest the hourly rates of Appellees' attorneys; rather, Appellant challenges the validity of the fee petition filing and my jurisdiction to adjudicate it. I accept Attorney Metz's opinion, and find it credible.

Consequently, I also find the hourly rates for Attorney Montgomery and Attorney Schertz reasonable as they fall well below the accepted hourly rates for practitioners in their community. Attorney Hoffman's hourly rates, however, exceed the amount attested to by Attorney Metz. His rates are inconsistent with Attorney Metz's assessment of reasonable rates for attorneys in the Harrisburg community. See Motion for Attorneys' Fee at Exh. P.

Appellees have not submitted any evidence supporting Attorney Hoffman's high hourly rate. Although Attorney Hoffman has worked exclusively on the fee petition, there is no evidence his work on the fee petition is specialized work or that this fee petition proceeding involved complex legal issues warranting specialized services at a higher hourly rate. See Washington, 89 F.3d at 1035; Institutionalized Juveniles v. Sec. of Pub. Welfare, 758 F.2d 897, 924 (3d Cir. 1985); Prandini v. Nat'l Tea Co., 585 F.2d 47, 54 (3d Cir. 1978); see also Motion for Attorneys' Fee at Exh. P. Therefore, because his hourly rate contradicts appellees' own evidentiary submission, I find Attorney Hoffman's hourly rate unreasonable and reduce it to $300 per hour, consistent with the prevailing hourly rate for practitioners in the Harrisburg legal community.[6]

B. Hours Reasonably Expended

Appellees request compensation for 196.55 hours of work on the appeal, the subsequent request for attorney's fees and sanctions, and Appellant's writ of certiorari to the United States

[6] Bridget Montgomery's hourly rate was a special lower rate she set for these particular clients. See Transcript at 19-22. Supreme Court. See Revised Statement at 1-3. Appellees submitted detailed invoices describing the different case-related work activities, the amount of hours spent on the activities, and the attorney who completed the tasks. See Fee Statement at Exh. Q1-4. Appellant contends fees related to his appeal to the United States Supreme Court should not be included in

the fee award. See Appellant's Motion to Dismiss at Exh. 1. I agree. Such fees were not incurred during the appeal to this Court. See Fed. R. Civ. P. 38. Thus, I recommend not including those hours in the award of fees. Appellant contests hours billed for researching sanctions. See Appellant's Brief in Opposition to Appellees' Motion For Sanctions and Award of Attorneys' Fees at 4, Lewis v. Smith, No. 08-3800 (3d Cir. Mar. 3, 2010) [hereinafter Appellant's Opposition Brief].[7] Further, during the hearing, Appellant questioned Attorney Montgomery on the reported time spent on the appellate brief and the fees associated with the fee petition. See Transcript at 79-90. Construing cross-examination liberally, I find Appellant made adequate objections to the hours Attorney Schertz spent on the appellate brief, the fees associated with the fee petition, and the hours spent researching Attorney Ostrowski's suspension, see Rode, 892 F.2d at 1183; see also Appellant's Opposition Brief at 4; Transcript at 79-90.

Fee awards should be reduced to reflect reasonable hours for these entries. See Hensley, 461 U.S. at 434; see also Bell v. United Princeton Props., Inc., 884 F.2d. 713, 721 (3d Cir. 1989).

[7] Appellant contested specific entries from September 8, 2008 through May 14, 2009. See Appellant's Opposing Brief at 4. However, Appellees revised their billing entries after the hearing, and excluded all of the contested entries in their fee petition. Nevertheless, because Appellant contests research spent on the issues of sanctions, which appear on the revised fee petition

under different dates, I will review the reasonableness of the reported hours of work on this issue. See Rode, 892 F.2d at 1183; see also Interfaith Cmty. Org., 426 F.3d at 711 (court cannot decrease fees sua sponte). An attorney must justify the expenditure of time in an efficient manner consistent with the experience that was reflected in the hourly rate. Ursic v. Bethlehem Mines, 719 F.2d 670, 677 (3d Cir. 1983). Thus, I must examine whether the time claimed was reasonably expended, necessary, and not excessive or duplicative. "A fee applicant cannot demand a high hourly rate — which is based on his or her experience, reputation, and a presumed familiarity with the applicable law — and then run up an inordinate amount of time researching that same law." See Ursic, 719 F.2d at 677. Additionally, the award for preparing and litigating the fee petition must be based on the time reasonably necessary to obtain a reasonable fee award. Institutionalized Juveniles, 758 F.2d at 924; Prandini, 585 F.2d at 54.

I have examined Appellant's detailed fee invoices. On a September 21, 2009 invoice, Attorney Montgomery reported 10.50 hours of work on the appellate brief and Attorney Schertz reported 46.10 hours of work on the appellate brief and attorneys' fees. Given the straightforward nature of the res judicata issues, the similarities between the issues on the district court level and on the appellate level, and the experience of counsel, the reported hours for the research and drafting of the appellate brief should be reduced. I also find Attorney Schertz's reported hours

for research on attorneys' fees to be excessive and unnecessary considering the relative simplicity of motions. Accordingly, I reduce Attorney Montgomery's hours from 10.50 hours to 8.50 hours and Attorney Schertz's hours from 46.10 hours to 38.10 hours on the September 21, 2009 invoice.

I examined Appellees' September 29, 2008 and January 22, 2010 invoices, which document work performed on the issue of sanctions. On January 22, 2010, Attorney Schertz billed the clients four hours for reviewing rules and drafting motions for sanctions before this Court, submitting the document to his supervising attorney, and calculating deadlines to file for costs and attorneys' fees. There are several entries from the September 29, 2008 invoices billing the clients for almost identical work. I find the January 22, 2010 entry duplicative and recommend deducting the four hours reported on the invoice. I also recommend reducing Attorney Schertz's hours on the March 31, 2010 invoice from 11.75 hours to 9.75 hours and Attorney Montgomery's hours from 2.70 to 1.5 hours because they are duplicative entries of work done for the attorneys' fee and sanctions petition. According to the May 17, 2010 invoice, Appellees spent 1.90 hours researching whether Attorney Bailey was ever previously sanctioned and whether Attorney Ostrowski's suspension from the District Court affected his appearance at the fee petition hearing. The issue of whether Attorney Bailey was previously sanctioned is irrelevant to whether he is sanctionable here. See Transcript at 117. Further, Attorney

Ostrowski's District Court sanction, which did not go into effect until after the evidentiary hearing, has no relevance. I find these entries unnecessary and recommend they be excluded. Thus, Attorney Montgomery's billable hours should be reduced from 4.3 hours to 4 hours and Attorney Schertz's hours from 2.9 hours to 1.30 hours for this invoice. Appellees should be compensated for 138.55 hours of work,[8] that is, the time requested reduced by the hours of work on the writ of certiorari and the unnecessary and excessive hours reported for the appellate brief, research of sanctions, and the fee petition. Accordingly, I recommend Appellee's Motion for Attorneys' Fees and Non-Taxable Costs

[8]I also found a clerical error in Exhibit Q-l, p. 16. David Schertz's hours are recorded as 17.30 hours. However, it should be 17 hours. See Fee Statement at Exh. Ql. I have adjusted the attorneys' fees award accordingly be GRANTED in part, DENIED in part, awarding Appellee $ 28,041.71 in attorneys' fees.

BY THE COURT:

\s\ TIMOTHY R. RICE
TIMOTHY R. RICE
UNITED STATES MAGISTRATE JUDGE